FABER MERLIN (M) BHD.

v.

MERLIN INN KEDAH SDN. BHD. (IN RECEIVERSHIP)

HIGH COURT MALAYA, KUALA LUMPUR
VC GEORGE J
[ORIGINATING SUMMONS NO. D1-24-169-89]
29 DECEMBER 1990

COMPANY LAW: *Receivership - Sale and purchase of land - Valuation of property by receiver - Company contends breach of trust - Evidence of offers - Terms of debenture - Duties of receiver - Damages - Whether adequate remedy.*

Pursuant to a debenture in favour of Bank Pembangunan Malaysia Bhd., on 17 January 1989 A was appointed receiver and manager (R & M) of the property of the defendant, M. In exercise of his powers of sale in the debenture, a entered into a sale and purchase agreement with W for RM11 million, for the sale of Kedah Merlin Inn and the land on which it stands (the proposed sale), these being the property of M.

The plaintiff FM owns 30% equity of M and sought a declaration that the proposed sale constituted a breach of trust; an *ex parte* interim injunction restraining the proposed sale was granted.

The issue was the differences in the valuations obtained by FM and A. FM states that the property was valued by well-known valuers, WTW at RM14.6 million. A obtained valuation from Colliers and said that after widespread advertisement of the property and 3 offers, the best offer was for RM11 million.

Held:

[1] FM has not proved that there is any offer better than the RM11 million offer; it has only CW's valuation whereas A has Collier's valuation and evidence of 3 offers; also, under the debenture, A has the contractual power to sell the property.

[2] There is no question of any act of misfeasance or breach of trust as A is doing what he has been appointed to do by M - in addition, the shareholders of FM are bound by the terms of the debenture.

[3] At worst FM might be able to demonstrate that A was negligent in entering into the agreement to sell the property at RM11 million; however the remedy for that is an action in negligence.

[4] In any event in respect of the complaints of FM, damages is obviously an adequate remedy and compared to FM, (who it was alleged without challenge is insolvent) A is in a better position to meet an order for payment of damages.

[Plaintiff's declaration refused; interim injunction discharged; Erinford injunction refused.]

For the Plaintiffs/Appellants - Major M.S. Murthi; M/s. Murthi & Partners
For the Defendants/Respondents - Cecil Abraham (Cik Bharti R. Seth with him); M/s. Shearn Delamore & Co.

JUDGMENT

VC George J:

On 17 January 1989 En. Abdul Samad bin Hj. Alias was, pursuant to a debenture in favour of Bank Pembangunan Malaysia Berhad, appointed the receiver and manager (R & M) of the property of Merlin Inn (Kedah) Sdn. Bhd. (MIKSB). By s. 8.02(c) of the debenture the R & M is given the power to sell or concur in the selling of any of the properties of MIKSB. One of such properties is the land and the building on it known as the Kedah Merlin Inn in respect of which the R & M entered into a sale and purchase agreement dated 24 May 1989 with Winjoy Development Sdn. Bhd., the agreed purchase price being RM11 million.

The plaintiff owns 30% of the equity of MIKSB. On 8 June 1989 the plaintiff took out the instant originating summons seeking *inter alia* a declaration that the proposed sale of the Kedah Merlin "is an act of misfeasance or an act constituting a breach of trust" and for an order restraining the proposed sale. On 9 June 1989 the plaintiff obtained an *ex parte* interim interlocutory injunction restraining the proposed sale, until disposal of the interlocutory application *inter partes*. The application was heard *inter partes* on 23 June 1989. It was dismissed with costs. The interim order of 9 June 1989 was discharged. An order for an enquiry of damages was also made. An Erinford injunction sought was refused.

The inspiration for the plaintiff's complaint that the proposed sale is a misfeasance or breach of trust is a valuation of the property at RM14,607,000 by the well-known valuers M/s. C.H. Williams, Talha & Wong Sdn. Bhd., on and as at 14 April 1989.

The R & M in his affidavit in opposition to the plaintiff's application pointed out that he had himself obtained a valuation of the property, from equally well-known valuers M/s. Colliers, Jordan Lee & Jaafar Sdn. Bhd. (Colliers), who gave us their considered opinion the market value and the forced sale value "for receivership purpose" of the property as on 2 March 1989 as RM10 million and RM7.5 million respectively.

The R & M went on to state that in order to obtain the best available price for the property he had caused to be circulated to his firm's offices in various major cities in the region particulars of the property in the form of a sales brochure which presumably was circulated among Colliers' clients in those cities. That the property was for sale was advertised in the local press. Three written offers were received. The shareholders of the MIKSB were informed of this and the opportunity was given to them to obtain other potential purchasers.

The best offer was that of RM11 million which was referred by the R & M to Colliers who advised that it be accepted. The sale and purchase agreement was entered into on 24 May 1989.

In coming to the Court the plaintiff has not been able to say that there is any offer better than the RM11 million offer. All it has is M/s. C.H. Williams' valuation. Against that the R & M have the Colliers' valuation and the evidence on oath of the 3 offers the best of which is the RM11 million offer. Further the R & M have the s. 8.02(c) power of selling the property which is a contractual power in effect given to the R & M by the owners of the property.

I agreed with En. Cecil Abraham, learned Counsel of the R & M that on the facts disclosed there is obviously no question of any act of misfeasance or breach of trust. The R & M is doing what he has been appointed to do which appointment is pursuant to the debenture that had been executed by MIKSB. Its shareholders including the plaintiff are bound by the terms of the debenture issued by the company.

I also agree with En. Cecil Abraham that at worst the plaintiff might be able to demonstrate that the R & M was negligent in entering into the agreement to sell the property at RM11 million. The remedy for that is an action in negligence. In any event in respect of the complaints of the plaintiff, damages is obviously an adequate remedy and compared to the plaintiff (who it was alleged without challenge is insolvent) the R & M is in a better position to meet an order for payment of damages.

I was satisfied that there is enough evidence for me to conclude as I do that it is doubtful that the plaintiff will succeed in the misfeasance and breach of trust complaint and that in any event damages will be an adequate remedy.

The orders made on the *inter partes* application had to be and were made. Nothing said or offered to the Court provided any sufficient basis for making an Erinford order. The application for that was also refused.

Also found at [1991] 1 CLJ 741